No. 84-786

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MAINE,
Petitioner

V.

PERLEY MOULTON, JR.,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment right to counsel is violated under Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), where, in the course of a good faith investigation of crimes for which a defendant has not yet been charged, the police unintentionally obtain in the absence of counsel the defendant's incriminating statements about crimes for which he has already been charged?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

MISCELLANEOUS

OPINIONS BELOW

The citation to the opinion of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr. is State v. Moulton, 481 A.2d 155 (Me. 1984). This opinion is also reproduced in the appendix of the State of Maine's printed Petition for a Writ of Certiorari at pages 1 through 42.

The Maine Superior Court order finding no violation of Mr. Moulton's Sixth Amendment right to counsel is reproduced in the appendix of the printed petition at pages 43 through 49.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

The opinion and judgment of the Supreme Judicial Court of Maine in State v. Moulton, 481 A.2d 155 (Me. 1984), was entered on August 16, 1984, and the Court's mandate issued the same day. The sixty-day period provided in U.S. Sup. Ct. Rule 20.1 for filing a certiorari petition would have ended on October 15, 1984. Pursuant to Rule 20.1, Mr. Justice Brennan, by order dated October 11, 1984, extended the State's time for filing its petition for certiorari by 30 days to and including November 14, 1984. The State of Maine's Petition for a Writ of Certiorari was timely filed on November 13, 1984.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On April 7, 1981, a Waldo County grand jury indicted Perley Moulton, Jr., and his friend Gary Colson on three felony counts of theft by receiving two stolen trucks and stolen auto parts and also a misdemeanor count of theft by receiving a stolen automobile. J.A. 8-12, 23-25, 51.

On November 4, 1982, Colson contacted the police to complain that he had been receiving threatening telephone calls. J.A. 25-26; State v. Moulton, 481 A.2d 155, 159 (Me. 1984); Pet. App. 9-10, 43-44. The police would not discuss with Colson any of the crimes committed by Moulton and Colson because Colson did not have a lawyer with him. J.A. 27-28, 72-74. No agreements were made nor any relationship established between the police and Colson at this time. J.A. 27-28, 73-74.

Two days later on November 6th, Moulton met with Colson to reveal his (Moulton's) plans to kill Gary Elwell, a State's witness in the criminal case against Moulton and Colson. J.A. 30-32; Moulton, 481 A.2d at 159; Pet. App. 10, 44-45.

Moulton told Colson that he would telephone Colson later to finalize plans for the murder. J.A. 33, 77.

On November 9 and 10, 1982, Colson again met with the police to discuss the threats he had been receiving and Moulton's plan to kill Gary Elwell. J.A. 64-66, 75-76; Moulton, 481 A.2d at 159; Pet. App. 10, 45. Colson, with his lawyer present part of the time, also discussed the crimes for which he had been indicted and other crimes. J.A. 28-30, 64-66, 74-75; Pet. App. 45. The police agreed not to bring any additional charges against Colson in exchange for his testimony at Moulton's trial. (Transcript of Jury-Waived Trial, Vol. II, at 293-95; see J.A. 63-66).

The police received reports from other State's witnesses, including Gary Elwell, that they had been threatened either in-person by Perley Moulton or over the telephone. J.A. 89, 98; Moulton, 481 A.2d at 159; Pet. App. 10. On November 12, 1982, the police gave Colson a recording device for his telephone in order to 1) investigate the threatening telephone calls Colson said he had been receiving, and 2) learn more about Moulton's plans to kill Gary Elwell. J.A. 50, 52, 67, 76, 77, 87, 99; Moulton, 481 A.2d at 159; Pet. App. 10, 45.

Without any prompting by Colson, Moulton initiated three telephone calls to Colson, who recorded the conversations and

turned over the tapes to the police.[1] J.A. 33-36, 39-40; Moulton, 481 A.2d at 159; Pet. App. 10, 45-46. In the first telephone conversation on November 21, 1982, Moulton stated, without being prompted by Colson, that he (Moulton) had "come up with a method" for killing Gary Elwell and that he wanted to meet with Colson sometime around Christmas to discuss Moulton's plans. (Transcript of Recorded Telephone Conversation, dated November 22, 1982, at 4-5). At the end of this conversation Moulton stated that he would telephone Colson again in a few weeks. (Id. at 13).

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[1] The recordings of the three Moulton-Colson telephone conversations were not offered at trial. Moulton, 481 A.2d at 159 n.3; Pet. App. 10 n.3.

In the second telephone conversation on December 2, 1982, Moulton called to discuss the discovery materials Moulton had recently received from the State. (Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 1-9). In the course of this conversation Moulton suggested that a defense at trial would be to blame two of the State's witnesses - viz., Gary and David Elwell - for the crimes charged to Moulton and Colson. (Id. at 5-6, 8). Near the end of the conversation Moulton affirmed that he would be coming to Colson's home around Christmastime so that they could review the discovery materials together and plan their defense. (Id. at 8).

In the third telephone conversation on December 14, 1982, Moulton, again without being prompted by Colson, discussed both the discovery materials and their defense. (Transcript of Recorded Telephone Conversation, dated December 14, 1982, at 1-5). Moulton stated that he wanted to meet with Colson "the entire day" on December 26th at Colson's home in order to review thoroughly their trial strategy, including the testimony each of them would present. J.A. 109-12. Because of their previous discussions, Colson raised the subject of Moulton's plan to kill Gary Elwell. Moulton agreed to discuss that plan on December 26th also. J.A. 110.

Prior to this meeting, the police equipped Colson with a body wire

transmitter so that the police could listen to and record the conversation. The officers' reasons for the body wire were 1) to protect Colson in the event that Moulton already realized, or should learn in the meeting, that Colson had become a police informant, and 2) to learn more about Moulton's plans for killing and otherwise tampering with witnesses. J.A. 53-54, 67, 85, 87; Moulton, 481 A.2d at 160; Pet. App. 13, 46. The police instructed Colson "to act like himself, converse normally, and avoid trying to draw information out of Moulton," which were the same instructions given to Colson earlier when the recording device was placed on his telephone. Pet. App. 46; Moulton, 481 A.2d at 161; Pet. App. 16; J.A. 35, 55-56, 61-62, 77-78, 87.

Near the beginning of the December 26th meeting Moulton initiated conversation about their defense. (Transcript of Body-Wired Meeting, dated December 26, 1982, at 5). Shortly later Moulton stated that he had an idea for their defense and wanted "to turn this thing right around and pin it on [Gary] Elwell, and David [Elwell]." J.A. 137. Moulton then questioned Colson to learn if Colson's arson of a dump truck could be blamed entirely on Gary Elwell. J.A. 142-45. Moulton also discussed his plans for an alibi defense, which depended on finding a witness who would commit perjury. J.A. 146-51. Moulton made additional incriminating statements throughout the meeting in the course of reviewing the

discovery materials and planning the perjured testimony to be given at trial by himself and Colson. J.A. 113-36. Some of Moulton's statements were prompted by Colson (see, e.g., J.A. 113-16), and some were not (see, e.g., J.A. 121-23).

On April 13, 1983, Moulton filed in Maine Superior Court (Waldo County) a pre-trial motion to suppress his statements to Colson in the three telephone conversations and the December 26th meeting. The motion was expressly based on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Me. Const. art. I, § 6. J.A. 16-19. At the suppression hearing, Respondent abandoned his Miranda-based Fifth Amendment challenge to the statements' admissibility, claiming

only that the statements were obtained in violation of Moulton's right to counsel under the Sixth Amendment and Me. Const. art. I, § 6. J.A. 22.

In an "Opinion and Order" filed June 20, 1983, the Suppression Hearing Justice denied Moulton's motion to suppress on the basis of Sixth Amendment law without ever discussing Me. Const. art. I, § 6. The Justice specifically found that Moulton's three telephone conversations and one "body wire" conversation with Colson

> were recorded for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted. Testimony shows that the recordings were made in order to gather information concerning the anonymous threats that Mr. Colson had been receiving,

> to protect Mr. Colson and
> to gather information
> concerning defendant
> Moulton's plans to kill
> Gary Elwell.

Pet. App. 48-49. Citing Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Justice ruled that the police here did not "deliberately elicit" or "create a situation likely to induce" Moulton's post-indictment incriminating statements in the absence of counsel. Pet. App. 49.

Following his conviction[2] in a

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[2] Mr. Moulton was convicted of Class B and Class C theft (17-A Maine Revised Statutes Annotated (M.R.S.A.) § 353 (1983)) and Class C burglary (17-A M.R.S.A. § 401 (1983)). J.A. 4, 6. These crimes were charged in two indictments (Superior Court Docket Nos. CR-83-13 and CR-83-16) out of seven indictments returned by a Waldo County grand jury on January 21, 1983. J.A. 12-15. Since these seven indictments covered the incidents alleged in the original indictments dated April 7, 1981, as well as several new charges, the original indictments against Moulton were subsequently dismissed. J.A. 1-2.

jury-waived trial in which portions of the body wire recording were admitted into evidence (J.A. 113-16, 119-23, 124-36, 137-51), Respondent appealed to the Maine Supreme Judicial Court, alleging, inter alia, that the manner in which the police obtained his incriminating statements at the December 26th meeting violated the Sixth Amendment. On review, the Maine Supreme Judicial Court found ample evidence to support the finding below that the body wire recording was made "for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted." Moulton, 481 A.2d at 160; Pet. App. 12-13. However, the Maine Court also stated that because Moulton and Colson were friends and codefendants

> the police knew, or should have known, that Moulton likely would make incriminating statements at the meeting that Colson recorded.

Id.; Pet. App. 15. Hence, the Court held that the police here violated Henry because

> [w]hen the police recommended the use of the body wire to Colson they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson.

Id. at 161; Pet. App. 18.

SUMMARY OF ARGUMENT

Respondent Moulton's Sixth Amendment right to counsel was not violated because the police did not "deliberately elicit" his post-indictment incriminating

statements. There was no "elicitation" because Moulton himself created the situation inducing his incriminating statements. There was also no "deliberateness" because the police's relationship with Moulton's friend and codefendant Gary Colson was not established for the purpose of obtaining any evidence from Moulton about the crimes for which he was indicted. Because Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), and United States v. Henry, 447 U.S. 264 (1980), require both police elicitation and deliberateness in order for there to be a "critical stage" of the criminal prosecution necessitating the assistance of counsel, there was no Sixth Amendment violation here.

A. In every case in which the Court has found that a pretrial event constituted a "critical stage" under the Sixth Amendment, the government has created a confrontation with the accused, either as a stage in the judicial process or as part of an on-going investigation of the crime. In finding Sixth Amendment violations in Massiah, Brewer, and Henry, the Court has applied a test of "deliberate elicitation," which is shorthand for determining 1) whether a confrontation with the accused was created by the government, and if so, 2) whether the government-created confrontation was for the purpose of obtaining post-indictment incriminating statements.

B. Because the police neither created Moulton's incriminating situation nor

intended to obtain statements from him about his pending charges, there was no Sixth Amendment violation here. Moulton himself created the situation inducing his incriminating statements by initiating all of the contacts between himself and his friend and codefendant Gary Colson in order to obtain Colson's aid for Moulton's trial defense plans. In effect, the body wire that the police placed on Colson's person and the recording device placed on his telephone were no more than listening posts for incriminating statements Moulton would have inevitably made without regard to whether Colson ever contacted the police. Moreover, none of the police actions in this case - viz., the body wire, the telephone recording device, and an

agreement not to bring any additional charges against Colson in exchange for his testimony at Moulton's trial - was for the purpose of obtaining post-indictment incriminating statements from Moulton.

ARGUMENT

MR. MOULTON'S SIXTH AMENDMENT RIGHT TO COUNSEL DID NOT APPLY TO HIS MEETING WITH THE BODY-WIRED INFORMANT BECAUSE THE MEETING WAS NOT A GOVERNMENT-CREATED CONFRONTATION OF THE ACCUSED REQUIRING THE ASSISTANCE OF COUNSEL.

In this case Respondent Moulton on his own initiative repeatedly sought out his friend and codefendant Gary Colson for assistance in killing a State's witness and planning the presentation of their defense at trial. Without any prompting by Colson,

who had contacted the police and become an informant, Moulton initiated a meeting between the two of them for the purpose of completely reviewing their trial defense. To protect Colson and investigate Moulton's plans to kill and otherwise tamper with State's witnesses, the police placed a listening device on Colson prior to this meeting.

The Maine Supreme Judicial Court held that the police use of the body wire violated Moulton's Sixth Amendment right to counsel because the police knew or should have known that Moulton would make incriminating statements about the crimes for which he had been indicted in his meeting with Colson. State v. Moulton, 481 A.2d 155, 160-61 (Me. 1984); Pet. App.

15-18. By applying this broad "foreseeability" standard for determining whether Moulton's incriminating statements were "deliberately elicited" in violation of the Sixth Amendment, the Maine Court misapprehended the scope of the Sixth Amendment and the import of this Court's decisions in Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977); and United States v. Henry, 447 U.S. 264 (1980). In contrast to those cases, there was no deliberate elicitation here both because Moulton himself created his incriminating situation and because the police did not use Colson for the purpose of obtaining Moulton's incriminating statements.

A. A "critical stage" of the prosecution exists for Sixth Amendment purposes only where the government creates the pretrial event in which the defendant incriminates himself and the event is created for the purpose of obtaining post-indictment incriminating statements.

The "core purpose" of the Sixth Amendment right to counsel is "to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" United States v. Gouveia, 104 S.Ct. 2292, 2298 (1984) (quoting United States v. Ash, 413 U.S. 300, 309 (1973)). In extending the right to certain pretrial events deemed "critical stages" of the criminal prosecution, the Court has repeatedly emphasized the importance of two

factors. First, the government has created an encounter with the defendant so that "'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both,' United States v. Ash, 413 U.S. at 310." Gouveia, 104 S.Ct. at 2298; see Ash, 413 U.S. at 311-12; United States v. Wade, 388 U.S. 218, 224-26 (1967). Second, "the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' United States v. Wade, supra, 388 U.S. at 224." Gouveia, 104 S.Ct. at 2298; see Ash, 413 U.S. at 309-13. Both factors have been present in every case in which the Court has found that a pretrial event constituted a

critical stage under the Sixth Amendment.[3]

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[3] For example, both factors were present in Wade, where the Court held that a government-created lineup, which produces potentially dispositive identification evidence, constitutes a trial-like confrontation of the accused requiring the presence of counsel. Wade, 388 U.S. at 228-36. In contrast, neither factor was present in Ash, where the Court held that a photographic display containing the defendant's picture is not a critical stage both because the accused himself is not present at the display and therefore cannot be confronted or "overpowered by his professional adversary" (Ash, 413 U.S. at 317) and because a photographic display, due to the ease with which it can be accurately reconstructed, can be cured of any defects or prejudice at the trial itself. Id. at 315-17, 318-20. Compare, e.g., Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing which determines whether the accused will be tried and could have consequences for his defense on the merits constitutes critical stage) with Gerstein v. Pugh, 420 U.S. 103, 122-25 (1975) (Fourth Amendment probable cause hearing addressed only to pretrial custody is not a critical stage because there are no serious consequences for the trial).

Critical stages fall into one of two categories - either 1) pretrial judicial proceedings where the accused is confronted by his adversary such as preliminary hearings (Coleman v. Alabama, 399 U.S. 1 (1970); White v. Maryland, 373 U.S. 59 (1963)) and arraignment (Hamilton v. Alabama, 368 U.S. 52 (1961)) or 2) investigative confrontations of the accused by prosecuting authorities such as line-ups (United States v. Wade, 388 U.S. 218 (1967)) and direct and surreptitious interrogations (Massiah; Beatty v. United States, 389 U.S. 45 (1967); Brewer; Henry). The Court has insisted on counsel for the defendant being present at these events in order to prevent the government from using these critical pretrial

confrontations, all of which the government has itself created, to frustrate the adversary process at the trial stage. In other words, the government is not allowed to undermine the adversary value of the accused's traditional right to the assistance of counsel at trial by generating pretrial events outside the presence of defense counsel where the government can obtain evidence from, or otherwise take advantage of, the uncounseled defendant and thereby "reduce the trial itself to a mere formality." Gouveia, 104 S.Ct. at 2298 (quoting United States v. Wade, 388 U.S. at 224). Cf. Coleman v. Alabama, 399 U.S. 1, 15-16 (1970) (Douglas, J., concurring) (in Russian criminal procedure issue of guilt

is resolved in pretrial interrogations "in the inner precincts of a prison" so that the trial concerns only the issue of punishment).

The Court's decisions in Massiah, Brewer, and Henry are firmly rooted in these Sixth Amendment principles. As the Massiah Court recognized, pretrial interrogation constitutes a critical stage of the prosecution because questioning of an uncounseled defendant by a law enforcement officer or his agent may deny the accused "effective representation by counsel at the only stage when legal aid and advice would help him." Massiah, 377 U.S. at 204 (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)). Massiah's "deliberately

elicited" standard is therefore shorthand for determining whether a pretrial event is in fact a police-created confrontation for the purpose of obtaining incriminating statements and thus a critical stage to which the right to counsel applies. See Kamisar, Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?, 67 Geo.L.J. 1, 41-55 (1978).

Viewed in the context of these Sixth Amendment principles, the "deliberately elicited" test consists of two distinct considerations. First, is there elicitation? That is, has the government itself created the situation inducing the defendant's incriminating statements? See Henry, 447 U.S. at 274-75. Second, if

there is elicitation, is it deliberate? That is, has it been done for the purpose of obtaining incriminating evidence? A Sixth Amendment violation occurs only when both parts of the test can be answered affirmatively.

The definition of the "elicitation" component of the "deliberately elicited" test - i.e., has the government created the situation that induces the defendant's incriminating statements - comports with the Sixth Amendment principle prohibiting the government from generating critical pretrial confrontations outside the presence of defense counsel. The definition thereby recognizes that a pretrial event in which the defendant incriminates himself is not a critical

stage of the prosecution unless the government itself creates the confrontation.

This point was acknowledged in both Brewer and Henry. In Brewer, no Sixth Amendment protection "would have come into play if there had been no interrogation," i.e., if Detective Leaming had not delivered his "Christian burial speech" which induced Williams to give incriminating information. Brewer, 430 U.S. at 400. Likewise, in Henry, the Court noted that an inanimate electronic listening device, which "has no capability of leading the conversation into any particular subject or prompting any particular replies" (see, e.g., United States v. Hearst, 563 F.2d 1331, 1347-48 (9th Cir. 1977), cert. denied, 435 U.S.

1000 (1978)), and a passive informant, who "makes no effort to stimulate conversations about the crime charged," may pose no Sixth Amendment problem. Henry, 447 U.S. at 271 n.9; see id. at 276-77 & n.* (Powell, J., concurring), 301 (Rehnquist, J., dissenting). The reason is because a "listening post" alone, by its inability to induce statements from the accused, does not create an incriminating situation.

The definition of the "deliberate" component of the "deliberately elicited" test - i.e., is the government's elicitation for the purpose of obtaining post-indictment incriminating statements - also accords with Sixth Amendment principles. This definition protects the Sixth Amendment interest in preventing the

government from creating pretrial events designed to elicit statements and thereby undermine the adversary value of the right to counsel at trial. It recognizes that the Sixth Amendment's concern is with intentional and purposeful, not negligent, frustration of the adversary process. See Henry, 447 U.S. at 279-80 & n.3, 282 n.6 (Blackmun, J., dissenting). Massiah and its progeny are therefore "expressly designed to counter 'deliberat[e]' interference with an indicted suspect's right to counsel." Henry, 447 U.S. at 282 n.6 (Blackmun, J., dissenting). Indeed, "[t]he unifying theme of Massiah cases... is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with

the specific intent of extracting information in the absence of counsel." Id. at 280 (Blackmun, J., dissenting). By focusing on governmental intent, the "deliberate" component of Massiah's "deliberately elicited" test "imposes the exclusionary sanction [only] on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent." Id. at 282 n.6 (Blackmun, J., dissenting).[4]

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[4] In contrast, the Maine Court's objective "foreseeability" test for finding a Sixth Amendment violation - viz., "that the police knew, or should have known, that Moulton likely would make incriminating statements at the meeting that Colson recorded" (Moulton, 481 A.2d at 160, 161; Pet. App. 15, 18) - suggests that the definition of "deliberate elicitation" under Massiah is informed by the objective definition of "interrogation" used for Fifth Amendment-Miranda purposes contained

The Court found Sixth Amendment violations in Massiah, Brewer, and Henry because both parts of the "deliberately elicited" test were satisfied in each one of those cases. In each case the government created a pretrial confrontation

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in Rhode Island v. Innis, 446 U.S. 291, 301 (1980) ("the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect"). However, this suggestion erroneously confuses the distinct policies underlying the Fifth and Sixth Amendments. Id. at 300 n.4. The Innis definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." Id. at 301; see Henry, 447 U.S. at 282 n.6 (Blackmun, J., dissenting).

with the defendant for the purpose of obtaining incriminating statements. In Massiah, the law enforcement officer placed a radio transmitter in the automobile of Massiah's codefendant, who had become an informant. The officer instructed the informant to invite Massiah to take a ride with him in the car and to engage Massiah in conversation relating to the pending indictment. Equipped with a radio receiver, the officer was able to overhear the informant's entire conversation with Massiah. Massiah, 377 U.S. at 202-03; United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962); Id. at 72 (Hays, J., dissenting); see also Henry, 447 U.S. at 279 (Blackmun, J., dissenting). By permitting the officer to monitor the

meeting, the listening device insured that the informant would follow the instructions to elicit post-indictment incriminating statements from Massiah. Henry, 447 U.S. at 279 n.2 (Blackmun, J., dissenting).

In Brewer, Detective Leaming denied permission for Williams' lawyer to accompany Williams in the police car on the ride from Davenport to Des Moines, Iowa. Having thereby isolated Williams from his lawyers and knowing Williams to be deeply religious and a former mental patient, Detective Leaming delivered the "Christian burial speech" for the conceded purpose of obtaining from Williams as much incriminating information as possible before he saw his lawyer again. Brewer, 430 U.S. at 391-93, 399 & n.6.

In Henry, the government had a contingent-fee arrangement with an informant, one of Henry's jailmates, who would be paid only if he produced useful information furnished by Henry. Henry, 447 U.S. at 270, 271 n.8. Although instructed not to question or initiate conversations with Henry regarding the pending charges, the informant was nevertheless free to discharge his responsibility, and earn his fee, "in myriad less direct ways" such as gaining Henry's confidence and participating in conversations in which Henry felt free and was subtly encouraged to discuss his past crime. Id. at 268, 271 & n.8, 274 & n.12. The likelihood of that result was significantly increased by the fact of Henry's incarceration. Id. at 273-74.

In all three of these cases, the government elicited the defendants' statements by creating the situations inducing the defendants to incriminate themselves. Moreover, in all three cases the elicitation was deliberate, i.e., for the purpose of obtaining incriminating evidence.[5] Hence, by engineering a critical pretrial confrontation with the accused outside the presence of defense

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[5] The Court found the Sixth Amendment to have been violated in Henry in precisely these terms, holding that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." Henry, 447 U.S. at 275 (emphasis added). Although Petitioner has interpreted the term "deliberate elicitation" to involve a two-pronged test, in practice most cases involving government-created confrontation also involve the government acting deliberately within the meaning of this test.

counsel, the government in each case undermined the value of the right to counsel at trial and thereby violated the Sixth Amendment.

B. Because the police neither elicited Moulton's post-indictment incriminating statements nor used the informant for the purpose of obtaining those statements, there was no violation of Moulton's Sixth Amendment right to counsel.

In contrast to Massiah, Brewer, and Henry, there was no Sixth Amendment violation - no deliberate elicitation - in this case. There was no elicitation in that the police did not create the situation in which Moulton incriminated himself at his meeting with the informant, Gary Colson, on December 26, 1982.

Moreover, there was an absence of deliberateness in that the police did not place the body wire on the informant, nor make any other arrangements with him, for the purpose of obtaining incriminating statements from Moulton about the pending charges.

In the instant case Moulton himself created the pretrial event inducing his incriminating statements. On November 6, 1982, prior to when Moulton's friend and codefendant Gary Colson became a police informant (J.A. 25, 27-28, 51, 73-74), Moulton met Colson to reveal his (Moulton's) plans to kill Gary Elwell, a State's witness in the criminal case against Moulton and Colson. J.A. 30-32; Moulton, 481 A.2d at 159; Pet. App. 10,

44-45. Moulton told Colson that he would telephone Colson later to finalize plans for the murder. J.A. 33, 77.

On November 21, 1982, Moulton telephoned Colson to say that he (Moulton) had "come up with a method" for killing Gary Elwell and that he wanted to meet with Colson sometime around Christmas to discuss Moulton's plans. (Transcript of Recorded Telephone Conversation, dated November 22, 1982, at 4-5). At the end of this conversaton Moulton stated that he would telephone Colson again in a few weeks. (Id. at 13).

On December 2, 1982, Moulton telephoned Colson to discuss the discovery materials Moulton had recently received from the State, which included statements given to

the police by three of the State's witnesses - Gary Elwell, David Elwell, and Leslie Ducaster. (Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 1-9). Moulton accused these witnesses of lying to the police in order "to cover up for themselves" (Id. at 2, 5), noted that the statements of Gary and David Elwell were inconsistent (Id. at 7), and suggested that a defense at trial would be to blame Gary and David Elwell for the crimes charged to Moulton and Colson. (Id. at 5-6, 8). Near the end of the conversation Moulton affirmed that he would be coming to Colson's home around Christmastime so that they could review the discovery materials together and plan their defense. (Id. at 8).

On December 14, 1982, Moulton telephoned Colson again and, since Colson was not home, left a message for Colson to call back. J.A. 36. When Colson called back, Moulton began to discuss the discovery materials and plan their defense. (Transcript of Recorded Telephone Conversation, dated December 14, 1982, at 1-5). Moulton stated that he would be coming to Belfast, Maine (the city in which Colson lives) on December 24th and would be leaving two days later on December 26th. (Id. at 7). Near the end of this conversation Moulton stated that he wanted to meet with Colson "the entire day" on December 26th in order to "review the whole plan." J.A. 109-10. Moulton told Colson:

> [Moulton]. We've gotta get our shh, we've gotta get our shit

together Gary and ah and ah, there's no ah, we can't frig around anymore.

[Colson]. Yeah.

[Moulton]. Gotta know what's going down.

[Colson]. Yeah. I sure do.

[Moulton]. And I'm telling you, you gotta keep running it through your mind after we go through it. You want to run it through your mind.

[Colson]. You got the whole report don't you?

[Moulton]. I got everything.

[Colson]. Yeah, ok. See, I don't have everything.

[Moulton]. Ok, well I'll bring it up with me.

J.A. 111-12. Because of their previous discussions, Colson raised the subject of Moulton's plan to kill Gary Elwell. Moulton agreed to discuss that plan on

December 26th also.[6] J.A. 110.

Near the beginning of the December 26th meeting Moulton initiated conversation about their defense, stating: "So you think we're in deep sh-- huhh?" (Transcript of Body-Wired Meeting, dated December 26, 1982, at 5). Shortly later Moulton stated that he had an idea for their defense and wanted "to turn this thing right around and pin it on [Gary] Elwell, and David [Elwell]." J.A. 137. Moulton then questioned Colson to learn if Colson's arson of a dump truck could be blamed entirely on Gary Elwell. J.A. 142-45. Moulton also discussed his plans

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[6] The three telephone conversations on November 21, December 2, and December 14, 1982, were the only contact between Moulton and Colson between their November 6th and December 26th meetings. J.A. 39-40.

for an alibi defense, which depended on finding a witness who would commit perjury. J.A. 146-51. Moulton made additional incriminating statements throughout the meeting in the course of reviewing the discovery materials and planning the perjured testimony to be given at trial by himself and Colson. J.A. 113-36. Some of Moulton's statements were prompted by Colson (see, e.g., J.A. 113-16), and some were not (see, e.g., J.A. 121-23).

By virtue of the three telephone conversations and the November 6th meeting, Moulton himself set in motion and fostered the chain of events that made inevitable his incriminating statements at the December 26th meeting. Without any

prompting by Colson, Moulton originated two separate approaches to their defense - 1) the plan to kill a State's witness (J.A. 30-32; see Moulton, 481 A.2d at 159; Pet. App. 10, 44-45) and 2) a trial strategy that included the presentation of perjured testimony. (Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 5-6, 8; J.A. 109-12, 121-23, 137, 146-51). From the November 6th meeting onwards, Moulton on his own initiative consistently contacted Colson for assistance in accomplishing both of Moulton's plans. (See J.A. 33-36 and the transcripts of the three telephone conversations). In accord with this pattern of their relationship, Moulton initiated the December 26th meeting with

Colson and put on the agenda a complete discussion of their trial strategy.[7] J.A. 109-12. Even though some of Moulton's statements at the meeting were prompted by Colson's questions and statements, Colson asked those questions and made those statements in the context of planning their trial strategy (see, e.g., J.A. 129-36, 137-51) - a situation created by Moulton. Under these circumstances Moulton himself,

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[7] The facts that Moulton arranged the November 6th meeting before Colson had become a police informant, and initiated each of the three telephone conversations in which the December 26th meeting was arranged without any prompting by Colson, are significant indicators that Moulton, not the police, created his self-incriminating situation. Cf. Henry, 447 U.S. at 272 n. 10 (issue of who initiated conversations between Henry and informant-jailmate was "irrelevant" in that case since the government, through its contingent-fee arrangement with the informant, had otherwise created a situation likely to induce Henry's incriminating statements).

not the police, created the pretrial event in which he incriminated himself outside the presence of defense counsel.[8]

Colson's relationship with the police does not negate this conclusion for two reasons. First, in contrast with Henry where the government contacted the informant as the first step in creating an incriminating situation (Henry, 447 U.S. at 266), here Colson sought out the police for

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[8] The Maine Court's determination that the police "intentionally created" Moulton's incriminating situation simply by placing the body wire on Colson (Moulton, 481 A.2d at 161; Pet. App. 18) takes a single act out of context and ignores the fact that Moulton at every turn created the situation in which he incriminated himself. The mere placement of a body wire cannot rise to the level of the government-created confrontation required by Massiah, Brewer, and Henry.

his own protection because he had been receiving threatening telephone calls. J.A. 25-26; Moulton, 481 A.2d at 159; Pet. App. 9-10, 43-44. In Colson's initial meeting with the police on November 4, 1982, the police discussed with him the threatening telephone calls but would not discuss any of the crimes committed by Moulton and Colson because Colson did not have a lawyer with him. J.A. 27-28, 72-74. Hence, when Colson met with Moulton two days later on November 6th - the meeting in which Moulton revealed his plans to kill Gary Elwell (J.A. 30-32; Moulton, 481 A.2d at 159; Pet. App. 10, 44-45) and set in motion the chain of events culminating in the December 26th meeting - Colson was not yet being used by the police for any purpose.

Second, the police instructed Colson "to act like himself, converse normally, and avoid trying to draw information out of Moulton" during the three telephone conversations and the December 26th meeting. Pet. App. 46; Moulton, 481 A.2d at 161; Pet. App. 16; J.A. 35, 55-56, 61-62, 77-78, 87. These instructions show that the police, instead of using Colson to elicit incriminating statements, were taking steps to comply with Massiah. Henry, 447 U.S. at 281 (Blackmun, J., dissenting) (quoting Wilson v. Henderson, 584 F.2d 1185, 1191 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979) (investigating officer's "directions, 'Don't ask questions; just keep your ears open,' suggest familiarity and attempted

compliance with, not circumvention of, the principle of Massiah")).

By telling Colson to maintain his relationship with Moulton as if he had never become an informant, the police instructions also functioned to preserve Colson's cover and possibly his life. The police did not thereby, however, create Moulton's incriminating situation. In the face of Moulton's repeated efforts to involve Colson in his plans, the police were simply not interfering with Moulton's own initiative in arranging to incriminate himself. This point is supported by Weatherford v. Bursey, 429 U.S. 545, 557 (1977), where the Court held that an informant who is invited to a meeting with the defendant and the defendant's lawyer to

assist in preparation of the defendant's trial defense is not required by the Sixth Amendment to refuse to attend the meeting and thereby "unmask himself." Since unquestionably there would be no Sixth Amendment issue if Colson had first approached the police after December 26th, it should make no difference under the circumstances here - viz., Moulton's self-created incriminating situation - that Colson, for his own safety, contacted the police before rather than after the three telephone conversations and the December 26th meeting while otherwise maintaining his normal relationship with Moulton.[9] See Massiah, 377 U.S. at

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[9] The Maine Court's rule of "foreseeability" establishes a bright-line test that post-indictment statements obtained by an informant, even a passive

212 (White, J., dissenting) (as a matter of policy, "[n]either the ordinary citizen nor the confessed criminal should be discouraged from reporting what he knows to the authorities and from lending his aid to secure evidence of crime."); see also Henry, 447 U.S. at 297 (Rehnquist, J., dissenting).

It also makes no difference under the Sixth Amendment whether the police gave Colson any incentives to violate the police

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one, or indeed an electronic listening post, can never be used at trial since a defendant's statements to an informant, who by definition has some relationship to or knowledge of the defendant, are virtually always foreseeable. Because this rule stretches Sixth Amendment protection beyond anything sanctioned by this Court, viz., to cases like the present one where there is neither police elicitation nor deliberateness, the rule should be rejected.

instructions - viz., the body wire on Colson's person (Moulton, 481 A.2d at 159; Pet. App. 11), the recording device on his telephone (Id.; Pet. App. 10), and the agreement not to bring any additional charges against him in exchange for his testimony at Moulton's trial[10]

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[10] Since the purposes of the body wire, the recording device, and the agreement not to bring additional charges were unrelated to obtaining statements from Moulton about his pending charges (J.A. 50, 52, 53-54, 63-66, 67, 77, 85, 87, 99; Moulton, 481 A.2d at 160; Pet. App. 13, 45-46; Transcript of Jury-Waived Trial, Vol. II, at 293-95), these three police actions did not give Colson an incentive to prompt post-indictment incriminating statements from Moulton in violation of police instructions. Cf. Henry, 447 U.S. at 268, 271 & n.8, 274 & n.12 (purpose of government's contingent-fee arrangement with informant was to obtain post-indictment incriminating statements from Henry; therefore, although instructed not to question or initiate conversations with Henry about pending charges, informant was nevertheless provided incentive - viz., the contingent-fee arrangement - to elicit

(Transcript of Jury-Waived Trial, Vol. II, at 293-95; see J.A. 63-66). For even after Colson had become a police informant, it was still Moulton who, without any prompting by Colson, consistently sought out Colson in order to plan and thoroughly discuss their defense at trial. Moulton thereby created the situation inducing his incriminating statements at the December 26th meeting without any help from the police. See Henry, 447 U.S. at 287 (Blackmun, J., dissenting) ("All Members of the Court agree that Henry's statements

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incriminating information from Henry "in myriad less direct ways" such as gaining Henry's confidence so that Henry felt free and could be subtly encouraged to discuss his past crime); Id. at 279 n.2 (Blackmun, J., dissenting) ("planted bug" in Massiah "underscored the agent's deliberate design to obtain incriminating information" and insured that the Massiah informant followed agent's instructions to elicit incriminating statements from Massiah).

were properly admitted if Nichols [the informant] did not 'prompt' him.").[11]

The police's relationship with Colson not only did not constitute "elicitation" but also did not satisfy the "deliberate" prong of the Massiah test. None of the police actions in this case was for the purpose of obtaining post-indictment incriminating statements from Moulton. The police placed the body wire on Colson in order to 1) protect Colson in the event

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[11] Neither Sixth nor Fourth Amendment rights are implicated by Moulton's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." See United States v. Henry, 447 U.S. at 272 (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)), 281 (Blackmun, J., dissenting), 297-98 (Rehnquist, J., dissenting); see also United States v. White, 401 U.S. 745, 752 (1971), cited in Henry, 447 U.S. at 272, and quoted in Henry, 447 U.S. at 298 n.7 (Rehnquist, J., dissenting).

that Moulton already realized, or should learn in the December 26th meeting, that Colson had become a police informant, and 2) learn more about Moulton's plans for killing and tampering with witnesses.[12] J.A. 53-54, 67, 85, 87; Moulton, 481 A.2d at 160; Pet. App. 13, 46. The purpose of the telephone recording device was to 1) investigate the threatening telephone calls

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[12] In addition to Colson's report of Moulton's plan to kill Gary Elwell (J.A. 75-77, 88), Gary Elwell himself reported to the police that he had received a threatening telephone call. J.A. 89-90. Moreover, two other State's witnesses complained to the police that they had been threatened. One of these witnesses was threatened by Moulton himself. J.A. 89. On this basis, the Maine Supreme Judicial Court found "ample evidence" to support the Suppression Hearing Justice's finding that the body wire and telephone recordings were made "for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted." Moulton, 481 A.2d at 160; Pet. App. 12-13; see Pet. App. 48-49.

Colson said he had been receiving,[13] and 2) learn more about Moulton's plans to kill Gary Elwell. J.A. 50, 52, 67, 77, 87, 99; Pet. App. 45. And the agreement not to bring any additional charges against Colson was in exchange for his testimony at Moulton's trial. (Transcript of Jury-Waived Trial, Vol. II, at 293-95; see J.A. 63-66). Although the police were aware that Moulton would make post-indictment incriminating statements at the December 26th meeting (J.A. 86), the police actions were not for the purpose of obtaining these statements

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[13] Colson told the police he had received four threatening telephone calls. The fourth call was on November 3, 1982, the day before Colson made his initial contact with the police. J.A. 95.

and therefore were not deliberate under Massiah, Brewer, and Henry.

In the absence of both police "deliberateness" and "elicitation," it was Moulton, not the police, who created his incriminating situation. Hence, the police did not violate Moulton's Sixth Amendment right to counsel, and the opinion of the Maine Supreme Judicial Court holding to the contrary should be reversed.

CONCLUSION

Since Moulton's incriminating statements at the December 26th meeting were not deliberately elicited by the police, the judgment of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr., 481 A.2d 155 (Me. 1984), should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wayne S. Moss, Counsel of Record for Petitioner State of Maine and a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Brief for Petitioner" to be served on the only other party to this proceeding - viz., Perley Moulton, Jr. - by depositing said copies in the United States Mail on May 10, 1985, postage prepaid, addressed to Respondent's Counsel of Record, Anthony W. Beardsley, Esquire, as follows:

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Dated at Augusta, Maine, this 10th day of May, 1985.

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